



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 25, 2004

Mr. Christopher B. Gilbert  
Bracewell & Patterson, L.L.P.  
711 Louisiana Street, Suite 2900  
Houston, Texas 77002-2781

OR2004-4221

Dear Mr. Gilbert:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 201557.

The Greater Houston Partnership (the "GHP") received a request for "a copy of all correspondence, contracts, business proposals, memos and any other materials either generated by the GHP or received by the GHP relating to the possible re-location of Citgo Petroleum Corp. from Tulsa, Okla., to Houston." You first contend that the GHP is not a governmental body subject to the Public Information Act (the "Act"). In the alternative, you claim that a substantial portion of the requested information is excepted from disclosure under sections 552.131 and 552.137 of the Government Code. We have considered your arguments and reviewed the submitted information, some of which consists of representative samples.<sup>1</sup>

We first address the threshold issue of whether the GHP is subject to the Act. The Act requires a governmental body to make information that is within its possession or control available to the public, with certain statutory exceptions. *See* Gov't Code §§ 552.002(a),

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<sup>1</sup>We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

.006, .021. Under the Act, the term “governmental body” includes several enumerated kinds of entities and “the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds[.]” *Id.* § 552.003(1)(A)(xii). The phrase “public funds” means funds of the state or of a governmental subdivision of the state. *Id.* § 552.003(5).

Both the courts and this office previously have considered the scope of the definition of “governmental body” under the Act and its statutory predecessor. In *Kneeland v. National Collegiate Athletic Association*, 850 F.2d 224 (5th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989), the United States Court of Appeals for the Fifth Circuit recognized that opinions of this office do not declare private persons or businesses to be “governmental bodies” that are subject to the Act “‘simply because [the persons or businesses] provide specific goods or services under a contract with a government body.’” *Kneeland*, 850 F.2d at 228 (quoting Open Records Decision No. 1 (1973)). Rather, the *Kneeland* court noted that in interpreting the predecessor to section 552.003 of the Government Code, this office’s opinions generally examine the facts of the relationship between the private entity and the governmental body and apply three distinct patterns of analysis:

The opinions advise that an entity receiving public funds becomes a governmental body under the Act, unless its relationship with the government imposes “a specific and definite obligation . . . to provide a measurable amount of service in exchange for a certain amount of money as would be expected in a typical arms-length contract for services between a vendor and purchaser.” Tex. Att’y Gen. No. JM-821 (1987), quoting ORD-228 (1979). That same opinion informs that “a contract or relationship that involves public funds and that indicates a common purpose or objective or that creates an agency-type relationship between a private entity and a public entity will bring the private entity within the . . . definition of a ‘governmental body.’” Finally, that opinion, citing others, advises that some entities, such as volunteer fire departments, will be considered governmental bodies if they provide “services traditionally provided by governmental bodies.”

*Id.* The *Kneeland* court ultimately concluded that the National Collegiate Athletic Association (the “NCAA”) and the Southwest Conference (the “SWC”), both of which received public funds, were not “governmental bodies” for purposes of the Act, because both provided specific, measurable services in return for those funds. *See Kneeland*, 850 F.2d at 230-31. Both the NCAA and the SWC were associations made up of both private and public universities. Both the NCAA and the SWC received dues and other revenues from their member institutions. *Id.* at 226-28. In return for those funds, the NCAA and the SWC provided specific services to their members, such as supporting various NCAA and SWC committees; producing publications, television messages, and statistics; and investigating complaints of violations of NCAA and SWC rules and regulations. *Id.* at 229-31. The *Kneeland* court concluded that although the NCAA and the SWC received public funds from

some of their members, neither entity was a “governmental body” for purposes of the Act, because the NCAA and SWC did not receive the funds for their general support. Rather, the NCAA and the SWC provided “specific and gaugeable services” in return for the funds that they received from their member public institutions. *See id.* at 231; *see also A.H. Belo Corp. v. S. Methodist Univ.*, 734 S.W.2d 720 (Tex. App.–Dallas 1987, writ denied) (athletic departments of private-school members of Southwest Conference did not receive or spend public funds and thus were not governmental bodies for purposes of Act).

In exploring the scope of the definition of “governmental body” under the Act, this office has distinguished between private entities that receive public funds in return for specific, measurable services and those entities that receive public funds as general support. In Open Records Decision No. 228 (1979), we considered whether the North Texas Commission (the “commission”), a private, nonprofit corporation chartered for the purpose of promoting the interests of the Dallas-Fort Worth metropolitan area, was a governmental body. *See* Open Records Decision No. 288 at 1. The commission’s contract with the City of Fort Worth obligated the city to pay the commission \$80,000 per year for three years. *Id.* The contract obligated the commission, among other things, to “[c]ontinue its current successful programs and implement such new and innovative programs as will further its corporate objectives and common City’s interests and activities.” *Id.* at 2. Noting this provision, this office stated that “[e]ven if all other parts of the contract were found to represent a strictly arms-length transaction, we believe that this provision places the various governmental bodies which have entered into the contract in the position of ‘supporting’ the operation of the Commission with public funds within the meaning of section 2(1)(F).” *Id.* Accordingly, the commission was determined to be a governmental body for purposes of the Act. *Id.*

In Open Records Decision No. 602 (1992), we addressed the status of the Dallas Museum of Art (the “DMA”) under the Act. The DMA was a private, nonprofit corporation that had contracted with the City of Dallas to care for and preserve an art collection owned by the city and to maintain, operate, and manage an art museum. *See* Open Records Decision No. 602 at 1-2. The contract required the city to support the DMA by maintaining the museum building, paying for utility service, and providing funds for other costs of operating the museum. *Id.* at 2. We noted that an entity that receives public funds is a governmental body under the Act, unless the entity’s relationship with the governmental body from which it receives funds imposes “a specific and definite obligation . . . to provide a measurable amount of service in exchange for a certain amount of money as would be expected in a typical arms-length contract for services between a vendor and purchaser.” *Id.* at 4. We found that “the [City of Dallas] is receiving valuable services in exchange for its obligations, but, in our opinion, the very nature of the services the DMA provides to the [City of Dallas] cannot be known, specific, or measurable.” *Id.* at 5. Thus, we concluded that the City of Dallas provided general support to the DMA facilities and operation, making the DMA a governmental body to the extent that it received the city’s financial support. *Id.* Therefore, the DMA’s records that related to programs supported by public funds were subject to the Act. *Id.*

In this instance, you state that the Citgo relocation project is being handled primarily by the Economic Development Division of the GHP. You state that the Economic Development Division creates jobs by working to retain Houston companies and to encourage corporate expansions and relocations. You also state that 13% of the GHP's funding comes from specific government contracts to provide economic development and trade services for these governmental bodies. After reviewing the submitted contracts, we do not believe that these contracts impose a specific and definite obligation on the GHP to provide a measurable amount of service in exchange for a certain amount of money as would be expected in a typical arms-length contract for services between a vendor and purchaser. Specifically, one provision of the contract between the GHP and the City of Houston obligates the GHP to:

. . . support the efforts of the University of Houston Small business Development Center in the conduct of the Director Business Assistance Program, designed to assist and promote the efforts of local businesses and entrepreneurs to form new business ventures or to expand existing business ventures.

As we found in Open Records Decision No. 228, we believe this provision, and others throughout the submitted contracts, places the various governmental bodies which have entered into the contract in the position of "supporting" the operation of the GHP with public funds within the meaning of section 552.003 of the Government Code. Although, as in Open Records Decision No. 602, the city is receiving valuable services in exchange for its obligations under this contract, the GHP has not sufficiently demonstrated that the nature of the services that it provides are known, specific, or measurable. *See* Open Records Decision No. 602 at 5. Consequently, the GHP's records concerning its operations that are directly supported by governmental bodies are subject to the Act as public information. *See id.*; *see also* Gov't Code §§ 552.002(a), .006, .021.

We now turn to your alternative arguments for the submitted information. First, however, we note that the submitted information includes materials that are subject to section 552.022 of the Government Code. Section 552.022(a) provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). As you assert, Exhibit E consists of an Economic Impact Report. We conclude that this report is expressly public under section 552.022(a)(1), and

may not be withheld unless it is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code.<sup>2</sup> You do not claim the Economic Impact Report is excepted from disclosure under section 552.108. You do, however, assert that section 552.131(b) excepts the submitted Economic Impact Report from disclosure.

Section 552.131(b) of the Government Code is a discretionary exception that protects a governmental body's interest and may be waived. As such, section 552.131(b) does not constitute "other law" making information confidential for purposes of section 552.022.<sup>3</sup> Therefore, the Economic Impact Report may not be withheld under section 552.131(b). Furthermore, because you claim no other exception for Exhibit E, we conclude the Economic Impact Report must be released.

We now consider your section 552.131 arguments for the remaining submitted information. Section 552.131 of the Government Code provides:

(a) Information is excepted from the requirements of Section 552.021 if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from the requirements of Section 552.021.

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<sup>2</sup>We note that you cite to Open Records Letter No. 2003-6340 (2003) in reference to the Economic Impact Report. In ORL 2003-6340, this office concluded that the submitted Economic Impact Report was expressly public pursuant to section 552.022(a)(1) of the Government Code. Consequently, the City of Terrell could not withhold the report under section 552.131(b), a discretionary exception to disclosure. Further, the City of Terrell did not demonstrate the applicability of section 552.131(a) to the report, and this office concluded the report must be released.

<sup>3</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general).

(c) After an agreement is made with the business prospect, this section does not except from the requirements of Section 552.021 information about a financial or other incentive being offered to the business prospect:

(1) by the governmental body; or

(2) by another person, if the financial or other incentive may directly or indirectly result in the expenditure of public funds by a governmental body or a reduction in revenue received by a governmental body from any source.

Gov't Code § 552.131. You state that the GHP "is not asserting that any of the information within its possession is a trade secret of Citgo." Therefore, we do not consider the applicability of section 552.131(a)(1).

However, you state that the bulk of the responsive information consists of information about a financial or other incentive being offered to Citgo and is therefore excepted under section 552.131(b). You state that, at the time the GHP received the present request, the GHP was "in economic development negotiations to have Citgo, a 'business prospect,' relocate from Tulsa to the City of Houston[.]" This office acknowledges that as of the date of this ruling, Citgo has announced plans to relocate from Tulsa, Oklahoma to Houston. We emphasize, however, that when the GHP received this request, negotiations were ongoing and no agreement had been reached. However, in determining whether the information at issue here must be released to the requestor, we have ruled on the circumstances as they existed at the time of the request.

In regard to the submitted information, you state that Exhibit A is the specific incentive package being offered to Citgo by the GHP on behalf of all its clients. You state that Exhibit B consists of communications between the State of Texas and Citgo regarding the level of incentives. You inform this office that Exhibit C consists of working notes of the GHP personnel who put together the incentive package. You state that Exhibit D consists of communications between GHP staff, GHP members, non-GHP members of the Houston business community, and state and local officials about what incentives can and should be offered to Citgo. Based on your representations and our review of the submitted information, we conclude that you may withhold Exhibits A, B, C, and D pursuant to section 552.131(b) of the Government Code.

You claim that Exhibits F, G, and H consist of commercial or financial information excepted under section 552.131(a)(2) of the Government Code. You give several specific examples of how the release of Exhibits F, G, and H would cause substantial competitive harm to the person from whom the information was obtained. Therefore, after reviewing your arguments and Exhibits F, G, and H, we conclude the GHP may withhold this information under section 552.131.

In summary, the GHP may withhold Exhibits A, B, C, and D under section 552.131(b) of the Government Code. The GHP may withhold Exhibits F, G, and H under section 552.131(a)(2). Exhibit E, the Economic Impact Report, must be released.<sup>4</sup>

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

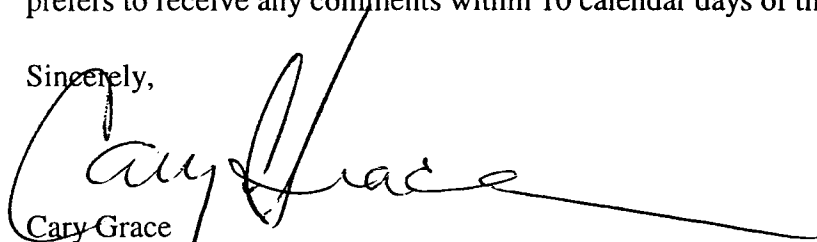
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<sup>4</sup>Because our ruling is dispositive, we need not address your claim under section 552.137 of the Government Code.

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cary Grace  
Assistant Attorney General  
Open Records Division

ECG/krl

Ref: ID# 201557

Enc. Submitted documents

c: Ms. Lynn Sixel  
Houston Chronicle  
c/o Christopher B. Gilbert  
(w/o enclosures)